

committed \$15 million to the development of original programming for distribution on DIY. Because Scripps intends to achieve some economies from collaborations with HGTV in terms of programming and marketing, Scripps' business plan projects DIY's break-even point at three to five years from launch, when Scripps expects DIY to have 8 to 10 million subscribers.³⁶ However, in the event that a digital must-carry requirement is adopted, Scripps will have to rewrite these projections, and may, in fact, forego launching the network altogether.

Planned cable networks in the initial development stages such as DIY would be the first victims of digital must-carry. While channel capacity and distribution are critical to the continued survival and commercial viability of *existing* networks, the further reduction of channel capacity due to a digital must-carry requirement would have an even more severe impact on *planned* cable networks. In the face of decreased channel availability on cable systems, DIY, for example, would not be able to get any meaningful carriage, let alone increase distribution levels needed to recover accumulated investment and attain break-even.³⁷

Indeed, the threat posed by a digital must-carry requirement already is being felt in the video programming market, and nascent and planned networks are folding in the face of a proposed digital must-carry requirement. For example, Your Choice TV, a nascent time-

³⁶ Linda Moss, *Scripps Delves into Digital With New Home Network*, MULTICHANNEL NEWS, Jan. 19, 1998, at 26.

³⁷ The court's concerns for broadcast networks' survival expressed in *Turner Broadcasting System, Inc. v. FCC*—"fallen into bankruptcy, curtailed their [] operations, and suffered serious reductions in operating revenues as a result of adverse carriage decisions by cable systems"—are equally applicable to satellite cable networks faced with the threat of further reductions in channel capacity. See *Turner Broadcasting System, Inc. v. FCC*, 580 U.S. 180, 117 S.Ct. 1174, 1195 (1997) ("*Turner*").

shifting programming service, closed its doors on July 31, 1998. A vice president of the network attributed its failure to the network's inability to obtain carriage on cable systems, *due in large part to cable operators' fears about digital must-carry requirements*.³⁸

Similarly, a digital must-carry requirement would greatly reduce Scripps' and others' incentives to launch new networks in the future and to invest in programming and marketing for such ventures. Indeed, the more restricted channel space becomes, the more likely Scripps and developing programmers are to abandon launch plans, thereby further reducing the availability to viewers of diverse, quality programming.

V. DIGITAL MUST-CARRY RULES WOULD NOT SURVIVE JUDICIAL REVIEW.

A. The Commission Lacks The Factual Record Necessary To Promulgate Effective Digital Must-Carry Rules.

Congress' analog must-carry legislation barely survived judicial review in *Turner Broadcasting Co. v. FCC*. It was sustained, however, because of the Court's deference to Congress' fact-finding role and the solid record produced by Congress in support of an analog must-carry requirement. For example, in that case, unlike here, the record was deemed to establish that cable systems stood as a bottleneck to the public's ability to receive free television. Moreover, the record was not found to be infected with uncertainties as to the broadcasters' transmission technology, and/or the technical and financial ability of consumers to receive the broadcast signals. Nor did the record demonstrate the presence of hundreds of

³⁸ *YCTV Closes Doors: Uncertain Times Cause Demise*, CABLEFAX DAILY, Aug. 4, 1998, at 1 ("Uncertainty over digital must-carry legislation made cable operators reluctant to make room for the service," according to YCTV Vice President Julie Lucas.).

niche cable networks competing with broadcast networks in offering diverse, high-quality programming to the viewing public.³⁹

Unlike the record developed by Congress in support of analog must-carry, the Commission will not be able to create a record supporting a digital must-carry requirement. Indeed, Chairman Kennard and Cable Services Bureau Chief Lathen have forecasted the difficulty of compiling such a record. Chairman Kennard recently queried: "what remains that makes broadcasters unique?"⁴⁰ Similarly, Chief Lathen indicated that a digital must-carry requirement should not be viewed as a right to which broadcasters are automatically entitled. "I think that what the Chairman said is that no one should assume that they have a right to be carried, and the case has to be made for that, and I think that's the way it should be."⁴¹

Many questions concerning the transition from analog to digital broadcast transmission simply cannot be answered in this proceeding. For example, it cannot be known at this juncture whether broadcasters will use their free spectrum to transmit one HDTV signal, multiple SDTV signals, other information, or a combination. Without this information it will be impossible to assess the full impact of digital must-carry on cable system channel capacity and competing cable programming networks. Indeed, the Commission acknowledges

³⁹ While only 72 basic cable networks existed at the end of 1993 (*Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442 ¶ 21 (1994)), the most recent data reveals that currently there are more than 250 national and regional cable networks competing for cable carriage. See note 28, *supra*.

⁴⁰ *Must Carry Madness: No Digital Must Carry For You, Hints FCC Chrm Kennard*, CABLEFAX DAILY, Sept. 16, 1998, at 1.

⁴¹ Ted Hearn, *FCC Chief Skeptical of Must-Carry*, MULTICHANNEL NEWS, Sept. 28, 1998, at 8.

uncertainty in the digital marketplace throughout the NPRM,⁴² and even notes that there is some doubt whether *any* digital must-carry requirement is necessary in the immediate future.⁴³ Moreover, although the proposed spectrum give-away to broadcasters is scheduled to conclude in 2006, the length of the analog-digital transition period is uncertain and there is considerable doubt that this return will occur as planned.⁴⁴ The resulting indeterminate period of "super carriage" rights for broadcasters would further chill the development of new networks and would make it more difficult for existing cable networks to survive.

In addition to a record that is unclear and insufficient to justify a digital must-carry requirement, the participants that will be most involved with any transition to a digital regime are not ready. There is substantial evidence that many broadcasters are not prepared to begin the transition to transmitting digital signals.⁴⁵ Moreover, several complex technical issues still

⁴² See NPRM ¶ 18 ("how the multiple technical systems [broadcast transmission, cable transmission and television receivers] will function in a digital environment remains to be seen. We note that the various technical elements involved in digital broadcast signal carriage are constantly in flux as technology advances."); ¶ 29 ("It is difficult at this point in time to determine the technical abilities of the different digital set top boxes already distributed and in production, and how different cable operators will engage set top boxes in their business plans."); ¶ 31 ("Whether [digital television receivers] will be capable of receiving QAM transmission, and be built with a standard interface such as IEEE1394, is less certain."); ¶ 58 (indicating it is not yet clear how much bandwidth is required to transmit HDTV signals).

⁴³ In Paragraph 33 of the NPRM, the Commission notes that should the retransmission consent election pattern of 1993-1996 be repeated with respect to digital broadcast signals, most top 30 market stations will elect retransmission consent, putting into doubt whether any digital must-carry requirements are necessary prior to 2002, when smaller market broadcast stations go digital.

⁴⁴ Paige Albinak, *Broadcasters Doubt 2006 Spectrum Return*, BROADCASTING & CABLE, July 13, 1998, at 19; *More Must Carry Madness: Roll Up The Sleeves on Firewall, Then Pontificate*, CABLEFAX DAILY, July 13, 1998, at 1 ("I will not see the return of spectrum in my lifetime," Senator McCain insisted.).

⁴⁵ A vice president of engineering at Cox Broadcasting has said that "[t]he equipment is so rudimentary now that we're not even sure that the sound will be in sync with the picture." He added "[t]his is like 1948, all right. We don't even know that we'll be able to send a digital signal yet."

need to be resolved, including interoperability of broadcast stations and cable systems.⁴⁶ In many cases, digital broadcast equipment will be tested for the first time when stations begin transmitting in November.⁴⁷ Perhaps even more significantly, television viewers—the group most adversely impacted by a digital must-carry requirement if cable systems are forced to provide additional channels to broadcasters—will not be in a position to take advantage of digital television's benefits until several years down the road. Very few consumers will have the financial or technical means to receive digital television signals over cable now or in the near future.⁴⁸ At best, there is an inadequate record upon which to assess the need for a digital must-carry requirement. At worst, the evidence demonstrates that it is much too premature to adopt rules for the carriage of largely redundant digital broadcast signals.

The matters as to which the record is unclear cannot be clarified by the comments filed in this proceeding but, rather, only by the market experience that will be gained over the next several years. As Chairman Kennard consistently has repeated, the Commission should

Another broadcast director stated that "[m]eeting the November deadline [for transmitting digital broadcast signals] will be a difficult task." Laura Evenson, *Transition Promises to Be Slow*, SAN FRANCISCO CHRONICLE, Sept. 3, 1998, at A13.

⁴⁶ As recognized by FCC Cable Services Bureau Chief Deborah Lathen at a speech to the National Association of Minorities in Communications at the Urban Markets Seminar, questions remain as to whether first generation digital television sets will be able to transmit an HDTV signal received through a cable television system. (speech dated Sept. 14, 1998). The industries are still in the process of creating the IEEE 1394 digital bus interface and debating whether to adopt QAM or VSB modulation. See Leslie Ellis, *CEMA Issues Fire-Wire Specifications*, MULTICHANNEL NEWS, Sept. 21, 1998, at 1 (reporting that CEMA introduced four technical standards differing from cable standards being developed by OpenCable Labs); *If DTV Sets Can't Display HDTV Programming*, COMMUNICATIONS DAILY, July 31, 1998, at 8-9.

⁴⁷ See note 45, *supra*.

⁴⁸ Todd Wallack, *Seeing the Future; HDTV Might Not Be An Immediate Turn-on; Gradual Impact Seen for HDTV*, BOSTON HERALD, Sept. 7, 1998, at D35; Evan Ramstad, *Matsushita Digital TVs to Debut in U.S. Stores*, THE WALL STREET JOURNAL, Aug. 3 1998, at A3.

permit market forces and consumer preference to dictate when and how digital broadcast signals are carried by cable systems. The Commission's model should be the pro-competitive 1996 Act.⁴⁹ Wisely, the Commission has recognized the importance of letting "market forces and private agreements . . . resolve [digital signal carriage] issues."⁵⁰ At an absolute minimum, the Commission should wait to see how these market negotiations are resolved before forging ahead with rules that may do far more harm than good in the promotion of digital broadcast television.

If the record illustrates anything clearly, it is that those consumers that can afford digital television equipment will be able to receive digital signals from broadcasters over the air.⁵¹ Moreover, other MVPDs, particularly DBS providers, stand ready to provide local broadcast signals to consumers and are developing their own digital transmission capabilities. Thus, unlike the prevailing marketplace that surrounded the analog must-carry debate, cable is not acting as a bottleneck to the distribution of digital broadcast signals to the home viewer.

⁴⁹ S. Rep. No. 104-230, at 1 (1996) (the Act shall "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.").

⁵⁰ NPRM ¶ 1; *see also* Statement By FCC Chairman William Kennard On Digital Television Transition, Oct. 6, 1998 ("the transition to digital TV will be set by the private sector, by the marketplace and by competition"); *Must Carry Madness: No Must Carry For You, Hints FCC Chmn Kennard*, CABLEFAX DAILY, Sept. 16, 1998, at 1 (Chairman Kennard expressed sentiment that market, and not regulators, should decide the issues involved with the transition to digital TV); *FCC has Broad Questions, No Answers, on Digital Must-Carry*, COMMUNICATIONS DAILY, July 10, 1998, at 2, 3 (quoting Commissioner Ness as stating "I firmly believe the industries can work together and will be working together" to solve carriage issue).

⁵¹ NPRM ¶ 88.

B. Expanding Must-Carry To Include Digital And Analog Signals Would Violate The First Amendment Rights Of Cable Operators And Programmers.

In the NPRM, the Commission identified alternative "statutory goals" upon which it may attempt to justify the creation of digital must-carry rules.⁵² These objectives can be condensed into one possible justification for extending dual analog and digital must-carry rights: to facilitate the transition to digital broadcasting. But this technological objective certainly does not justify additional subordination of cable operators' and networks' First Amendment rights. The Commission's desire to transition broadcast television to a digital format cannot rationalize a rule that would force cable operators to carry two (or possibly more) redundant signals from each broadcast licensee and would relegate cable networks to second class status as First Amendment speakers.

As an initial matter, as demonstrated above, the Commission lacks any record from Congress or any historical basis to assume that digital must-carry is needed.⁵³ The intrusion associated with digital must-carry cannot be justified based solely on conjectural harm to broadcasters. Yet, because digital broadcasting is in its infancy, an "abstract assertion" is all that is possible at this time. Virtually every question about digital broadcasting remains open: technical issues, consumer acceptance, workable business models, etc. The Commission

⁵² These goals include: (1) the successful introduction of digital broadcast television and the subsequent recovery of the vacated broadcast spectrum (NPRM ¶ 1); (2) retention of the strength and competitiveness of broadcast television (*id.*); (3) the desire to "provide assurance [to broadcasters] that investment in digital technology and programming will be fully realized" (*id.* ¶ 41) and (4) the desire to assure digital broadcasters that they will reach the audience they are licensed to serve. *Id.*

⁵³ "[T]he mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms." *Quincy Cable T.V., Inc. v. FCC*, 768 F.2d 1434, 1454 (D.C. Cir. 1985).

recognized many unsettled issues surrounding digital television in the NPRM.⁵⁴ Thus, analysis of the impact of mandatory carriage of digital television signals is impossible to conduct with any degree of certainty, and provides no basis upon which a reviewing court could uphold such requirements.

Moreover, it is highly questionable whether the Commission's desire to facilitate a transition to digital broadcasting would be deemed a "substantial governmental interest" by a reviewing court. As Justice O'Connor explained in *Turner*, "the must-carry provisions have never been justified as a means of enhancing broadcast television." 117 S. Ct. at 1214. Similarly, the Court in *Turner* stated that "[m]ust-carry is intended not to guarantee the financial health of all broadcasters" 117 S. Ct. at 1202. Yet, the Commission's stated desire to "assure" broadcasters about the transition to digital appears intended to do exactly that. The Commission should recognize that promoting digital technology is not a sufficiently urgent imperative, as was the preservation of over-the-air television, to justify the adoption of the proposed digital must-carry rules.

CONCLUSION

A digital must-carry requirement makes absolutely no sense: the adverse impact on cable networks providing diverse and high-quality programming to the home viewer would be devastating, and many unanswered questions remain that prevent the Commission from developing a reasoned set of guidelines for a digital must-carry regime that would benefit consumers. For these and the foregoing reasons, Commenters respectfully request the Commission to consider the significant adverse impact that a digital must-carry requirement

⁵⁴ See note 42, *supra*.

would have on existing niche cable networks, such as Commenters, and those networks planned for launch by Scripps and others, and to refrain from increasing demands on cable channel capacity by imposing a digital must-carry requirement at this time.

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